BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LUIS CANO	)	
Claimant	)	
VS.	)	
	)	Docket No. 202,489
ANDY MACKEY PAINTING	)	
Respondent	)	
AND	)	
	)	
FARM BUREAU MUTUAL INSURANCE CO. INC.	)	
Insurance Carrier	)	

ORDER

On March 12, 1997, the Application of respondent for review by the Workers Compensation Appeals Board of the Award of Administrative Law Judge John D. Clark dated September 10, 1996, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Darla Lilley appearing for Kim R. Martens of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

"1. Whether the Administrative Law Judge erred in finding claimant sustained a permanent injury and disability when the credible medical evidence established the work accident only caused a temporary aggravation of a preexisting condition.

"2. Whether the Administrative Law Judge erred in awarding a permanent partial work disability in excess of the functional impairment when respondent returned claimant to accommodated work at the same average weekly wage and claimant was then terminated for cause for failing to call in or show up for work.

"3. Whether the Administrative Law Judge erred in finding that claimant's average weekly wage was $320.00 when the uncontroverted evidence established that claimant's average weekly wage was $240.

"4. Whether the Administrative Law Judge erred in failing to apply the preexisting condition offset contained in K.S.A. 44-501(c) by not reducing the permanent partial disability percentage by the percentage of claimant's functional impairment that preexisted.

"5. Whether the Administrative Law Judge erred in computing the amount of compensation due claimant as of September 10, 1996."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law.

Claimant was working for respondent in March 1995 as a painter when the ladder on which he was standing collapsed, causing claimant to fall backwards and suffer injury to his low back and his jaw. Claimant was referred to a chiropractor and eventually was seen by Robert L. Eyster, M.D., who became his treating physician. Dr. Eyster first examined claimant on May 8, 1995, and was given an appropriate history regarding claimant's fall. Claimant's complaints at that time were limited to the low back, the right sacroiliac joint region and down the back of the right leg. X-rays and MRI studies indicated no disc herniation but did show evidence of bulging or degenerative disc disease at L4-5 and L5-S1. Claimant was taken off work for a period of time and eventually returned to work with a 5 percent functional impairment rating from Dr. Eyster. Dr. Eyster felt that

claimant's symptomatology and functional impairment were a natural and probable consequence of the underlying degenerative disc disease. Dr. Eyster released claimant to return to work on June 26, 1995, with restrictions of no lifting over 40 pounds, no repetitive lifting over 20 pounds, and no excessive bending or twisting. He opined that claimant's injury on March 27, 1995, had been nothing more than a temporary aggravation of claimant's preexisting condition. When he released claimant on June 26, 1995, it was his opinion that claimant was physically able to return to substantial gainful employment within the work restrictions placed upon him. For reasons not contained in the evidentiary record, claimant did not return to work for respondent until October 9, 1995.

Claimant was examined by Lawrence Richard Blaty, M.D., on October 6, 1995. Dr. Blaty's findings were very similar to those of Dr. Eyster in that the x-rays and MRIs reviewed indicated no disc herniation or bony stenosis but Dr. Blaty did diagnose degenerative disc disease and facet changes in the low back. Dr. Blaty assessed claimant either a 7 percent rating to the whole body or a 5 percent rating to the whole body depending upon which version of the AMA Guides he was utilizing at the moment. Dr. Blaty also placed restrictions on claimant of no lifting greater than 40 pounds occasional or 15 pounds frequent and restricted claimant to occasional bending or twisting. He also opined claimant should be given the opportunity to change from weight bearing to nonweight-bearing at 90-minute intervals. He cautioned claimant to avoid overhead activities which would require hyperextension of the low back. Neither Dr. Blaty nor Dr. Eyster felt claimant was a surgical candidate and both felt he was capable of returning to work within the restrictions placed upon him. Dr. Blaty did disagree with Dr. Eyster regarding whether claimant's injury of March 27, 1995, had any permanent effect on claimant's preexisting back condition. He felt claimant had suffered a permanent injury or aggravation of his condition from the work-related injury.

Respondent acknowledges claimant suffered accidental injury arising out of and in the course of his employment but denies any permanency resulting therefrom. It is significant that claimant testified to having no preexisting physical limitations or symptoms before this fall. Subsequent to the fall claimant was symptomatic in his low back.

The Appeals Board finds claimant did suffer permanent injury as a result of the accident of March 27, 1995. The fact that claimant was asymptomatic prior to the fall and symptomatic afterwards indicates that claimant's degenerative disc disease was aggravated permanently by the injury. The Appeals Board further finds that both Dr. Eyster and Dr. Blaty felt claimant had a 5 percent whole body functional impairment as a result of the fall and adopts same as its finding.

The Appeals Board is next asked to consider whether claimant's injury resulted in a work disability. In considering whether work disability is appropriate the Appeals Board must consider K.S.A. 44-510e(a) which states in part:

> "Permanent partial disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Claimant returned to work with respondent on October 9, 1995, approximately three-and-a-half months after being released by Dr. Eyster. As stated above, no explanation was given for claimant's delayed return. After claimant returned to work he missed numerous days for a multitude of reasons. At times claimant was physically incapable of working, at times his automobile was not functioning properly, at times claimant was attending medical examinations and at other times claimant missed work with no explanation. Two employees of respondent testified regarding the availability of work within claimant's restrictions. Mr. William Andy Mackey, owner of respondent Andy Mackey Painting, testified that claimant had multiple opportunities to work but on numerous occasions did not show. He also discussed the fact that work within claimant's restrictions was readily available and he was at all times ready to accommodate claimant's limitations. Mr. Ray Lankard who, while not currently employed by respondent, was claimant's supervisor while claimant worked with respondent, testified regarding the fact that work on a regular basis was available to claimant within claimant's limitations. He discussed cautioning claimant on more than one occasion regarding exceeding his limitations. Both Mr. Mackey and Mr. Lankard acknowledge that claimant missed numerous days of employment, at times calling in per company policy and at times failing to do so.

Claimant and claimant's stepdaughter testified to having called in on numerous occasions. Unfortunately claimant's stepdaughter does not support claimant's contention that he called in on a regular basis. There were occasions in the record, particularly during the month of November, when claimant's stepdaughter could not explain who may or may not have called in for claimant. Claimant acknowledges he at no time called in, being unable to fluently speak English.

There were several occasions when claimant's stepdaughter acknowledged calling in late in the day, sometimes as late as 4:30 in the afternoon, as she was unable to contact anyone before school.

In the week leading up to claimant's termination, claimant missed several days of work.

It is not disputed that claimant's return to work was at a wage comparable to the wage he was earning at the time of his injury.

Respondent terminated claimant's employment in January 1996 citing claimant's poor attendance record as justification for this termination.

In reviewing the evidence in the record the Appeals Board finds that while claimant did contact respondent on many occasions regarding his inability to come to work, there were numerous occasions when claimant did not contact respondent. A situation similar to this arose in Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991) where the claimant was returned to work with respondent and later terminated after having missed 24 out of 57 possible work days subsequent to his return to work. The Court of Appeals found claimant had failed to put forth a good-faith effort in returning to work for respondent and was thus not entitled to a work disability. Here claimant was returned to accommodated employment within his restrictions by the respondent at a wage equal to 90 percent or more of claimant's average weekly wage at the time of the injury. Claimant's termination of employment came about as a result of attendance problems generated by claimant himself. The Appeals Board finds that claimant failed to put forth a good-faith effort in his return to employment with respondent and is not entitled to a work disability. As such claimant is limited to his functional impairment of 5 percent.

The Appeals Board must next look to the issue of claimant's average weekly wage. It is acknowledged claimant made $8.00 per hour while working for respondent. The dispute exists as to whether claimant was a full-time or part-time employee and whether he was usually and regularly expected to work 40 hours per week or less. Claimant, at hire, was of the impression that he would be working 40 hours per week. A review of the record, however, indicates claimant at no time worked a full 40-hour week although on many occasions he did appear to come close. William Andy Mackey, owner of respondent's business, testified that claimant was a part-time employee and would never work 40 hours per week. The testimony of claimant and Mr. Mackey is diametrically opposed. The one witness who testified regarding this matter who does not appear to have a personal interest in the outcome of this litigation is Mr. Ray Lankard. Mr. Lankard no longer works for respondent and was claimant's supervisor during the time claimant was employed with respondent. Mr. Lankard testified he was a full-time employee expected to work 40 hours per week. Mr. Lankard also testified that claimant was hired as a full-time employee and he expected claimant to work 40 hours per week if work was available. All parties acknowledge that due to limitations from weather conditions on many occasions

they were not able to work a full 40-hour week but Mr. Lankard did advise that claimant was expected to be available should work be available and the weather cooperative.

The Appeals Board finds, based upon the testimony of Mr. Lankard, that claimant was a full-time employee under K.S.A. 44-511 and as such the minimum hours for computing his wage shall be 40 hours per week, which when taking into consideration claimant's $8.00 per hour pay, computes to an average weekly wage of $320 per week.

Respondent objects to the Administrative Law Judge's failure to apply the preexisting condition offset contained in K.S.A. 44-501(c) which states in part:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Again a dispute arises between the testifying physicians. Dr. Eyster felt claimant's entire functional impairment stemmed from the preexisting condition. Dr. Blaty on the other hand found claimant to have suffered a 5 to 7 percent functional impairment as a result of the injuries sustained with respondent. In proving entitlement to a functional impairment offset the burden should be upon respondent. The Appeals Board finds the medical evidence insufficient to prove claimant suffered a preexisting condition which would entitle respondent to a reduction in claimant's functional impairment. As such, the Appeals Board finds an offset under K.S.A. 44-501(c) to be inappropriate and the denial by the Administrative Law Judge of said offset is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 10, 1996, should be affirmed in part and modified in part and an award is granted in favor of the claimant, Luis Cano, for a 5% permanent partial general body functional impairment awarded against the respondent, Andy Mackey Painting, and its insurance carrier, Farm Bureau Mutual Insurance Company, Inc., for the accidental injury occurring on March 27, 1995.

Claimant is entitled to 20.71 weeks temporary total disability compensation at the rate of $213.34 per week in the amount of $4,418.27, followed by 20.47 weeks permanent partial functional disability at the rate of $213.34 per week in the amount of $4,365.90 for a total award of $8,784.17. As of March 13, 1997, the entire award is due and owing in one lump sum minus amounts previously paid.

In all other respects the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Court Reporting Service	
Deposition of Luis Cano	$257.25

Deposition Services	
Transcript of regular hearing	$307.50
Deposition of William Andy Mackey	$187.40
Deposition of Ray Lankard	$269.40
Deposition of Robert L. Eyster, M.D.	$148.30
Alexander Reporting Co.	
Deposition of Maria Antonia Estrada	$247.70
Deposition of Lawrence Richard Blaty, M.D.	$330.20
Deposition of Karen Crist Terrill	$288.10

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Kim R. Martens, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director